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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,

Petitioner,

vs.

FRANK SMITH.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

A. M. HENDERSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the United States:

I.

Summary of Matter Involved.

The legal question here involved is whether one can prosecute a remedy to final conclusion and accept the benefits thereof and thereafter prosecute another and wholly inconsistent remedy for the same injuries and retain the benefits of both.

This is an action at law brought in the United States District Court, for the Northern District of Ohio, Eastern Division, by Frank Smith, respondent herein, against Price

Brothers Company, petitioner herein, for damages for personal injuries.

At the conclusion of all the evidence, the trial court instructed the jury to return a verdict in favor of petitioner (R. 176). The respondent prosecuted appeal, and the judgment of the trial court was reversed and a new trial ordered by the Circuit Court of Appeals.

A—Respondent's Complaint.

The original complaint (R. 187) was filed against The Babcock & Wilcox Company and The Babcock & Wilcox Tube Company on August 1, 1940, and alleged that as a result of the negligence of the named defendants, respondent, on June 18, 1940, sustained severe bodily injuries while in the employ of petitioner (respondent while working on a scaffold was thrown to the ground when it was struck by a hoisting cable).

On February 15, 1941, respondent filed an amended complaint (R. 2) and added the petitioner as a party defendant. He omitted the allegation contained in the original complaint to the effect that at the time of the accident he was in the employ of petitioner.

B—Petitioner's Answer.

On May 7, 1941, petitioner filed its separate amended answer (R. 6) and asserted several defenses, but the one with which we are here concerned is that of estoppel.

Petitioner alleged that it was a contributor to the Ohio Workmen's Compensation Fund and that subsequent to the accident respondent filed an application with the Industrial Commission of Ohio for Workmen's Compensation necessarily predicated upon the fact that he was an employee of petitioner; that such Commission found that he was an employee of petitioner at the time of the accident

and awarded him compensation and he accepted such compensation and was accepting it at the time of the trial; and that by reason thereof he was estopped from maintaining his action. (The law of Ohio provides that an employer contributing to the Workmen's Compensation fund shall not be liable to an action at common law by an injured employee.)

C—The Proof

The other defendants were dismissed and the action proceeded only against petitioner.

On June 8, 1940, respondent and one Meglan, who claimed to be operating as a partnership, submitted to petitioner, who was erecting a building for Ohio-Edison Company at Toronto, Ohio, the following written proposal (R. 181):

"Columbus, Ohio, June 8, 1940.

Price Pros.,
General Contractors,
Toronto, Ohio.

Re: Ohio Power Co., Addition, Toronto, Ohio.

Gentleman:

We proposed to furnish all labor, materials and equipment necessary to clean exterior brick and stone masonry, clean interior face brick masonry and do necessary pointing of brick and stone masonry on the above job for the sum of $560.00.

We also propose to furnish swinging scaffold and necessary equipment, you to furnish materials and pay for actual time worked on the job at mason's wages ($1.75 per hour) the total cost of materials and labor not to exceed $560.00. We are to receive the difference between actual cost and $560.00.

We agree to do all work in a neat workmanlike manner according to plans and specifications.

Respectfully submitted,

FRANK P. MEGLAN COMPANY,
By FRANK P. MEGLAN."

All negotiations were carried on by Meglan (R. 62).

Petitioner's evidence tended to prove that Meglan was told that he and respondent could not do the work as sub-contractors unless he presented certificates showing that the Meglan Company carried public liability insurance (R. 134, 135, 149) and that, if such certificates were presented, they could have the job as sub-contractors; while, if they were not presented, they were to be placed upon the payroll of petitioner. It is conceded that no certificates of coverage were furnished.

Meglan testified that no such conversation occurred, and simply stated that he was not told which proposal petitioner did accept (R. 108).

The legal distinction between the two proposals is certainly not clear, but the question of estoppel does not depend upon the existence of a distinction and so we shall not indulge in comment.

On June 17th, respondent and Meglan commenced work (R. 16) and on the following day the accident occurred (R. 18). Respondent was taken to a hospital and remained there about seven weeks (R. 22). A day or two after the accident, petitioner's paymaster called Meglan to his office and drew up an ante-dated acceptance of the proposal of June 8th (R. 155). He testified that he wanted to reduce the terms of the oral acceptance to writing (R. 150).

Meglan testified that the paymaster simply suggested this ante-dated acceptance and the putting of respondent upon petitioner's payroll, and he acceded to this sugges-

tion (R. 99). Meglan testified that he never informed respondent of what had been done (R. 116).

On July 5, 1940, there was filed with the Industrial Commission of Ohio an application for Workmen's Compensation by respondent (R. 204).

A portion of this application was filled out by respondent's paymaster, a portion by respondent's attending physician, who presented it to respondent to be signed. His physician died before the case was called for trial (R. 41, 42). Respondent testified that at the time this was presented to him it was in blank and he was told by his physician that it was simply something for the State (R. 76). Respondent further stated that, although he did not know what he was signing at the time, he thought when he received his first check for Workmen's Compensation that it was an application for Workmen's Compensation but upon the basis that he was entitled to compensation as an employee of his partnership (R. 76, 77). (Under the Ohio law, partner employees are not entitled to Workmen's Compensation. However in fairness to respondent, he may not have known this.)

Respondent testified that he continued in this belief until his deposition was taken in Columbus, Ohio, on October 25, 1941—approximately five weeks before trial (R. 74).

The evidence offered by petitioner disclosed that on October 8, 1940—almost fourteen months prior to trial and over four months prior to the filing of the amended complaint against petitioner, respondent's attorneys examined his file at the Industrial Commission for the purpose of learning his status (R. 78; Def's. Exs. C & D, R. 192, 193), and thereupon learned that the award of compensation to respondent was made by the Commission upon the basis that he was an employee of petitioner at the time of the accident. Nevertheless no withdrawal of respondent's application for Workmen's Compensation was ever made and

he continued to accept the awards of the Industrial Commission (R. 74, 168, 169).

D—Judgment of District Court.

The District Court, in directing a verdict for petitioner (R. 176), held that respondent could not retain his claim for Workmen's Compensation under the Workmen's Compensation Act, which was based upon the relationship of employer-employee, and at the same time maintain a suit against petitioner for the same injuries upon the theory that he was not an employee, but an independent contractor.

E—Decision of Circuit Court of Appeals.

The Circuit Court of Appeals held that the respondent was not estopped from instituting the present suit because, under his state of the evidence, he did not believe that he was obtaining Workmen's Compensation on the basis that he was an employee of petitioner, but entertained the erroneous belief that he was receiving such benefits as an employee of his partnership; that under his state of the evidence his application for Workmen's Compensation was void and no jurisdiction was conferred upon the Industrial Commission, and the question of whether or not he had estopped himself from maintaining this action was a question of fact for the jury to decide.

The court gave no consideration whatever to the knowledge obtained by respondent's attorneys when they examined his file at the Industrial Commission.

II.

Questions Presented.

The questions presented are as follows:

1. Is the knowledge which an attorney gains in the course of his employment by a client imputed, as a matter of law, to such client?

2. Is one who has accepted and retained benefits of one remedy estopped from thereafter seeking recovery for the same injuries upon another and wholly inconsistent remedy?

3. Where the facts upon which estoppel is asserted are undisputed, should the issue of estoppel be submitted to a jury, or should such issue be decided by the trial court?

III.

Reasons Relied Upon for the Allowance of the Writ.

We respectfully submit that this petition for writ of certiorari should be granted for the following reasons:

A. The decision of the Circuit Court of Appeals, in ignoring the knowledge obtained by respondent's attorneys and in failing to hold as a matter of law that the respondent had estopped himself from maintaining this action, are decisions of important questions of local law probably in conflict with local applicable decisions.

B. The decision of the Circuit Court of Appeals so far departs from the usual and accepted judicial course of proceedings as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals, for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket No. 9285, Frank Smith, Appellant, *vs.* Price Brothers Com-

pany, Appellee, to the end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this court and the judgment of the District Court affirmed, and for such further relief as to this court may seem proper.

A. M. HENDERSON,
Counsel for Petitioner.